BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DR. F. W. L. TYDEMAN)

Appearances:

For Appellant: Gardiner Johnson and Samuel C. Shenk, Attorneys at Law

For Respondent: Burl D. Lack, Chief Counsel; Crawford H. Thomas, Associate Tax Counsel; Hebard P. Smith, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Commissioner (now succeeded by the Franchise Tax Board) on the protest of Dr. F. W. L. Tydeman to a proposed assessment of additional personal income tax in the amount of $223.54 for the year 1942.

Appellant was an employee of the Shell Oil Company from 1915 until his retirement on December 31, 1940. In 1917 he became a member of the "Provident Fund of the Combined Petroleum Companies," hereinafter referred to as "Fund," which had been established by the Shell Oil Company and its subsidiaries for the benefit of their employees. Each employee admitted to membership in the Fund contributed a specified percentage of his fixed salary thereto and his employer contributed an equal amount, all the contributions being credited to a separate account in the employee's name, An employee could, in addition, elect to have credited to his account any bonus to which he was entitled. Ail contributions were invested by the Fund and the net earnings therefrom were credited as interest to each member employee's account on a proportionate basis. Under the Rules and Regulations governing the operations of the Fund, any member who terminated his employment within five years of its commencement was entitled to receive his own fixed salary contributions, plus any interest accrued thereon. After five years of employment everything standing to his credit, including his employer's contributions, became his property, and i: he then terminated his employment, he was entitled to payment of t: entire amount of the credit.

Appellant continued as a member of the Fund until his retirement, contributions regularly being made until then by him and for his account by his employer. He received annual statement; from the Fund over the years, each setting forth the credit balances for the aggregate contributions made both by himself and the employer, up to the commencement of the current year, along wit!

-the contributions made and interest earned during that year. Bach statement from 1926 on also included the language "All rights to the above amounts are subject to the Rules and Regulations of the Fund." When Appellant retired on December 30, 1940, the Rules and Regulations then in effect permitted the immediate withdrawal of an employee's own fixed salary contributions on termination of employment and the withdrawal within six months thereafter of the employer's contributions, any contributions from bonuses and any interest credited to the employee's account. Appellant on retirement elected to receive his own fixed salary contributions in a lump sum and to receive the balance of the amount credited to him in five equal annual installments during the years 1941 to 1945, inclusive. He was a resident of California at the time of retirement, having originally become a resident of this State on January 1, 1933, and remaining such continuously thereafter.

In his returns for the years 1941 to 1945, inclusive, Appellant, who was on a cash receipts and disbursements basis, showed as taxable income all amounts credited after January 1, 1935 as employer contributions to and as earnings on his account in the Fund. He also disclosed all such amounts credited to and earned on his account prior to that date, but did not report them as taxable income. In this latter category was a sum of $11,967.03 which Appellant received in 1942 pursuant to his election to receive in installments the balance credited to his account:

Appellant maintains that he was justified in excluding the $11,967.03 from his 1942 income on the ground that this amount had accrued to him prior to January 1, 1935; the operative date of the Personal Income Tax Act (now Part 10, Division 2, Revenue and Taxation Code), and, in part, before he became a California resident and that, consequently, to tax it as 1942 income, merely because it was received in that year, is to give the law an improper retroactive effect.

The Commissioner argues, on the other hand, that the amount did not accrue before January 1, 1935, but even if it did, it nevertheless was taxable in view of the decisions in Dillman v. McColgan, 63 Cal. App. 2d 405, and Cullinan v. McColgan, 80 Cal. App. 2d 976, and, furthermore, that it was taxable in 1942 under, Section 12(f) of the Personal Income Tax Act (now Sections 18156, et seq. of the Revenue and Taxation Code) as a distribution under an employees' pension ***trust.***

We are in accord with the view of the Commissioner that the January 1, 1935, date is without significance for, so far as Section 36 of the Act (now Section 17020, Revenue and Taxation Code) is concerned, the income in question is taxable to Appellant for 1942 under the Dillman and Cullinan decisions, even though it 'accrued prior to 1935.

We believe, however, that the position of the Appellant as respects January 1, 1933, the date on which he became a California resident, is correct. Section 16(g) of the Act (now Section 17566 of the Code) provided as follows:

> "(g) When the status of a taxpayer changes from resident to nonresident, or from nonresident to resident, there shall be included in determining income from sources within or without this State, as the case may be, income and deductions accrued prior to the change of status even though not otherwise includible in respect of the period prior to such change, but the taxation or deduction of items accrued prior to the change of status shall not be affected by the change."

We have heretofore had occasion to consider the question of the accrual of interest and employer contributions to the Fund and remain of the view that under the authorities cited (Continental Tie & Lumber Co. v. United States, 286 U.S. 290; H. Liebes & Co. v. Commissioner, 90 Fed. 2d 932; Helvering v. Russian Finance & Construction Co., 77 Fed. 2d 324) in our opinion in the Appeal of Charles E. Hammond (June 16, 1942), those contributions and the interest did accrue during the year in which they were credited to Appellant's account with the Fund. It follows, then, that Section 16(g) relieves from tax any portion of the $11,967.03 that accrued prior to January 1, 1933, unless a conclusion to the contrary is required by some other provision of the Act.

It is to this end that the Commissioner cites the pension trust provisions of Section 12(g) and argues that in view of those provisions the amount in question must be included in Appellant's income for 1942, that being the year in which that amount was actually distributed or made available to him from the Fund. We find nothing in that Section, however, that indicates any legislative intent that the fundamental rule embodied in Section 5 of the Act (now Section 17052 of the Code) that a nonresident be taxed only on income derived from sources within this State, as implemented by Section 16(g) as respects a change of status of an individual from nonresident to resident, be any the less applicable to income from a pension trust than to other income.

We conclude, accordingly, that the Appellant is not required to include in his taxable income for 1942 any pre-January 1, 1933, employer contributions and interest credited to his account in the Fund, but that he is taxable with respect to the receipt in 1942 of post-January 1, 1933, employer contributions and interest so credited.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Commissioner (now succeeded by the

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Franchise Tax Board) on the protest of Dr. F. W. L. Tydeman to a proposed assessment of additional personal. income tax in the amount of $223.54 for the year 1942 be and the same is hereby modified as follows: the Commissioner's action in including in the 1942 gross income of said Dr. F. W. L. Tydeman such portions of the $11,967.03 received by the latter in 1942 as represented his employer's contributions and any interest credited to his account in the "Provident Eund of the Combined Petroleum Companies" prior to January 1, 1933, is hereby reversed; in all other respects the action of the Commissioner is hereby sustained,

Done at Sacramento, California, this 5th day of January,, 1950, by the State Board of Equalization,

George R. Reilly, Chairman
J. H. Quinn, Member
J. L. Seawell, Member
Wm. G. Bonelli, Member

ATTEST: Dixwell L. Fierce, Secretary